IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4283 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CMC (INDIA) PROPRIETORY

Versus

SMT.SAVITABEN ATMARAM SOLANKI

Appearance:

1. Special Civil Application No. 4283 of 1994

MR KM PATEL for Petitioner No. 1

MR SHAILESH C PARIKH for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 22/03/2004

ORAL JUDGEMENT

Heard learned advocate Mr. K.M. Patel for the petitioner and Mr. Shailesh Patel, learned advocate for

the respondents. In this petition, the petitioner has challenged the award made by the Industrial Tribunal, Ahmedabad in Complaint IT No. 198 of 1991 in Reference (IT) No. 668 of 1989 dated 19thNovember, 1993 wherein the Tribunal has set aside the order of termination in respect of two workmen Savitaben Atmaram and Anandiben Valjibhai and has directed the petitioner to reinstate said two workmen with continuity of service with full back wages for the intervening period.

Learned advocate Mr. Patel appearing for the petitioner has submitted that though written statement was filed raising contention to the effect that the petitioner employer has not committed any breach of section 33 of the ID Act, 1947, and, therefore, complaint is not maintainable under section 33A of the ID Act, 1947, the tribunal has entertained such complaint and in doing so, the tribunal has committed gross error in coming to the conclusion that there has been breach of section 33 of the ID Act, 1947. He also submitted that section 33-1 of the ID Act, 1947 has not been pressed by the workmen and no contention in that regard was raised by the workman but the only contention raised by the workmen was that the petitioner has committed breach of section 33-2 of the ID Act, 1947. Mr. Patel further submits that section 33-2 (a) and (b) of the ID Act, 1947 are not applicable to the facts of the present case because clause (a) of section 33(2) of the ID Act, 1947 relates to alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceedings and clause (b) of section 33-2 of the ID Act is relating to any misconduct not connected with the dispute, discharge or punishment whether by dismissal or otherwise, that workman. He submits that the entire case of the workmen is based on the retrenchment and violation of section 25-F and 25-N of the ID Act. He made reference of page 23 to 27, 30, 33 and 38 where the reference has been made by the workman about retrenchment. According to him, whole complaint is based on the violation of section 25-F and 25-N of the ID Act, 1947, therefore, 'retrenchment' is not 'change of condition of service' and it is 'simple termination of service not connected with any misconduct' and, therefore, not attracting the provisions of section 33-2 of the ID Act, 1947 and it cannot be said that the petitioner has committed breach of section 33-2 of the ID Act, 1947. It was also his contention that there is no relationship of employer and employee between the petitioner and the workmen; these workmen were the employees of the labour contractor and there is no

privity of contract between the parties. Thus, it was his contention that the complaint against the petitioner was not maintainable. He made reference to page 77/78 and drawn attention of this Court to the observations made by the tribunal and submitted that the tribunal has committed gross error in understanding section 33-2 of the ID Act, 1947. He also submits that when preliminary contention has been raised by the employer about the maintainability of the complaint, it was the duty of the tribunal to examine this aspect and then to enter into the merits of the matter. He submits that it ought to have been appreciated by the Tribunal that unless and until it is established by the workmen that there was breach of section 33 of the ID Act, 1947, the complaint is not maintainable. He also submits that this important aspect has totally been ignored by the tribunal while considering the matter and, therefore, the impugned award made by the tribunal on the basis of the violation of section 25-F and 25-N of the ID Act without breach of section 33 of the ID Act, 1947 is bad and without jurisdiction and therefore liable to be quashed and set aside.

On the other hand, learned advocate Mr. Parikh appearing for the workmen submits that the complaint is filed because of the pendency of the reference wherein these workmen were the concerned workmen; retrenchment is malafide, there was unfair labour practice and victimization and on the basis of these grounds, the retrenchment was challenged before the tribunal. He also submits that there was violation of section 25-F and 25-N of the ID Act, 1947 by the employer. He emphasized that section 33-2 is not applicable because it is alteration in service condition. He submits that it is the discharge simpliciter which will come within the purview of section 33-2(b) of the ID Act, 1947. He also submits that out of total 11 workmen, 9 workmen were taken back by the employer and, therefore, for the remaining two workmen, award was made by the tribunal. He drew attention of this court to certain portion of the award from page 33 to 38, 67 and 78 and then pointed out that the findings of the tribunal are to the effect that the retrenchment is mala fide and, therefore, the complaint is maintainable and, therefore, there is no error on the part of the tribunal in making such an award. Except these submissions, no other submissions were made by either Mr. Patel on behalf of the petitioner or Mr. Parikh on behalf of the workmen.

I have perused the award in question made by the tribunal. I have also perused the dispute referred to for

adjudication. I have also considered the submissions made by the learned advocates for the parties.

As per section 33-A of the ID Act, 1947, special provisions for adjudication as to whether conditions of service, etc. changed during pendency of proceedings, have been made wherein the complaint is maintainable when the workman establish before the concerned court that section 33 of the ID Act,1947 has been violated by the employer and the workman is aggrieved by that, then, the complaint is maintainable. If there is no breach of section 33, and if that fact is not established, then, the complaint is not maintainable in law and the concerned Tribunal has no jurisdiction to deal with such complaint under the law. Considering the evidence on record as discussed by the tribunal, whole case of the workmen is based on retrenchment, that the retrenchment is illegal because of the contravention of section 25-F and 25-N of the ID Act, 1947, it is mala fide, unfair labour practice and victimization from the employer and, therefore, the retrenchment is bad. Looking to the complaint itself, challenge is made against the retrenchment. Considering the prayers made in the complaint, prayers are also relating to retrenchment. In view of that, in the facts of the present case, the only question is as to whether the simple retrenchment would fall within the purview of section 33-2 of the ID Act, 1947 or not. For considering and appreciating this aspect, relevant provisions of section 33-2(a) and (b) of the ID Act 1947 are required to be appreciated. Same are, therefore, reproduced as under:

"33.Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.- (1) xxx

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workmen,

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding, or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman;

Provided that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

Now, considering the facts of this case, there is no question of punishment connected with the misconduct and it is also not the case of the workmen. Here, only retrenchment order has been passed which has been challenged by the workmen on the ground that the employer has committed breach of section 33 of the ID Act, 1947. The apex court has also examined that issue that whether the retrenchment is amounting to change in conditions of service or not in Bhavnagar Municipality v. Alibhai Kaimbhai and others, AIR 1977 SC 1229. The apex court observed that, ordinarily, retrenchment may not amount to alteration of conditions of service. The apex court, in the said decision, considered alteration of conditions of service of certain workmen only on the ground that the demand of permanency was pending before the concerned tribunal and, therefore, the apex court observed that when the workmen demanded for better conditions of service demanding permanency or other benefits relating to permanency and regularization and during the pendency of such dispute, if the employer terminated services of such workmen by way of retrenchment, then, prior permission from the tribunal is necessary under section 33-(1) of the ID Act, 1947. Now, considering the facts of the present case, looking to the dispute referred to for adjudication, there is no demand of permanency and regularization referred to for adjudication by the appropriate Government. All the demands raised by the present workmen are relating to certain benefits, allowances and holidays and other service benefits but in reference, no demand is raised by the workmen about permanency and regularization. Further, before the tribunal, it was not the case of the workmen that the employer has committed breach of section 33-1 of the ID Act. Those observations have been made by the Tribunal at page 78. Therefore, the Tribunal has examined only section 33-2 of the ID Act, 1947. In aforesaid decision, the apex court has considered that in order to attract the provisions of section 33-1 (a) of the ID Act, following features must be present. Para 10 of the said

decision is therefore reproduced as under:

"10.In order to attract section 33(1)(a), the following features must be present:

(1) There is a proceeding in respect of an industrial dispute pending before the Tribunal.

(2) Conditions of service of the workmen applicable immediately before the commencement of the Tribunal proceeding are altered.

(3) The alteration of the conditions of service is in regard to a matter connected with the pending industrial dispute.

(4) The workmen whose conditions of service are altered are concerned in the pending industrial dispute.

(5) The alteration of the conditions of service is to the prejudice of the workmen."

Relevant observations made by the apex court in para 13 of the said judgment are reproduced as under:

"13. Retrenchment may not, ordinarily, under all circumstances, amount to alteration of the conditions of service. For instance, when a wage dispute is pending before a Tribunal and on account of the abolition of a particular department the workers therein have to be retrenched by the employer, such a retrenchment cannot amount to alteration of the conditions of service. In this particular case, however, the subject matter: being directly connected with the conversion of the temporary employment into permanent, tampering with the status quo ante of these workers is a clear alteration of the conditions of their service. They were entitled during the pendency of the proceeding before the Tribunal to continue as temporary employees hoping for a better dispensation in the pending adjudication. And if the appellant wanted to effect a change of their system in getting the work done through a contractor instead of by these temporary workers, it was incumbent upon the appellant to obtain prior permission of the Tribunal to change the conditions of their employment leading to retrenchment of their services. The alteration of the method of work

culminating in termination of the services by way of retrenchment in this ease has a direct impact on the adjudication proceeding. The alteration effected in the temporary employment of the respondents which was their condition of service immediately before the commencement of the proceeding before the Tribunal, is in regard to a matter connected with the pending industrial dispute."

For filing complaint under section 33-A, it is necessary for the workman concerned to establish first of all the breach of section 33 of the ID Act. Unless such breach is established, such complaint is not maintainable. In the facts of this case, breach of section 33 is not established by the workman because while retrenching the workman, there is no need to obtain approval from the tribunal under section 33-2(b) of the ID Act, 1947. Retrenchment is not a change in conditions of service and, therefore, there is no breach of section 33-2(a) of the ID Act. So, the foundation of the complaint under section 33-A is the contravention of section 33 of the ID Act and if the workman is unable to establish such contravention in making the order of discharge or dismissal, the complaint would be liable to be dismissed and that is the position in the case before hand. This aspect has been examined by the apex court in M/s. Punjab Beverages Pvt. Ltd. v. Suresh Chand and another reported in AIR 1978 SC 995. In para 11 of the said decision, it has been observed by the apex court as under:

"11. It will, therefore, be seen that the first issue which is required to be decided in a complaint filed by an aggrieved workman under section 33A is whether the order of discharge or dismissal made by the employer is in contravention of section 33. The foundation of the complaint under section 33A is contravention of section 33 and if the workman is unable to show that the employer has contravened section 33 in making the order of discharge or dismissal, the complaint would be liable to be rejected. But if the contravention of section 33 is established, the next question would be whether the order of discharge or dismissal passed by the employer is justified on merits. The Tribunal would have to go into this question and decide whether, on the merits, the order of discharge or dismissal passed by the employer is justified and if it is. The Tribunal would sustain the order,

> treating the breach of section 33 as a mere technical breach. Since in such a case, the original order of discharge or dismissal would stand justified, it would not be open to the Tribunal, unless there are compelling circumstances, to make any substantial order of compensation in favour of the workman. In fact in Equitable Coal Co.'s case an order of compensation made by the Tribunal in favour of the workman was reserved by this Court. The Tribunal would have to consider all the aspects of the case and ultimately what order would meet the ends of justice would necessarily have to be determined in the light of the circumstances of the case. But this much is clear that mere contravention of section 33 by the employer will not entitle the workman to an order of reinstatement, because inquiry under section 33A is not confined only to the determination of the question as to whether the employer has contravened section 33, but even if such contravention is proved, the Tribunal has to go further, and deal also with the merits of the order of discharge or dismissal."

Now, looking to the findings given by the tribunal at page 78, after referring to Bhavnagar Municipality Case, the Tribunal has observed that it is not the case of the workmen that the employer has committed breach of section 33-1(a) of the ID Act, 1947. Before the Tribunal, case of the workmen is to the effect that section 33-2(b) has been violated by the employer because one month salary was not paid during the pendency of the reference and no approval application is filed for retrenching the workmen concerned. Therefore, according to the tribunal, the complaint is maintainable.

I have considered the observations made by the tribunal which are contrary to section 33 of the ID Act, 1947. Sec. 33-1(a) of the ID Act, 1947 is not the case of workmen and section 33-2(b) of the ID Act, 1947 is not applicable in the facts of the present case because it is not a termination amounting to punishment relating to misconduct in question but it is a simple termination by way of retrenchment. Therefore, this retrenchment is not covered by section 33-2(b) of the ID Act, 1947 and, therefore, it is not necessary for the employer to obtain approval while retrenching the said workmen from service. The findings recorded by the tribunal are against the

statutory provisions and this is the gross error committed by the tribunal and, therefore, the impugned award made by the tribunal is required to be quashed and set aside.

In the result, this petition is allowed. The award made by the Industrial Tribunal, Ahmedabad in Complaint IT No. 198 of 1991 in Reference (IT) No. 668 of 1989 dated 19th November, 1993 is hereby quashed and set aside. Said Complaint (IT) No. 198 of 1991 is hereby ordered to be dismissed. Rule is made absolute accordingly with no order as to costs.

Learned advocate Mr. Parikh appearing for the respondents workmen submits that the tribunal has granted reinstatement of two workmen respondents herein and as per the order passed by this Court, both the workmen have received last drawn wages as per section 17-B of the ID Act, 1947 upto September, 2003 and thereafter, they have not received such wages under section 17-B of the ID Act, 1947. He submits that though the award in question has been set aside by this court today, the respondents workmen are entitled for the wages under section 17-B of the ID Act upto the date of the order of this Court and, therefore, the petitioner may be directed to make payment of the remaining benefits under section 17-B of the ID Act to the respondents within some reasonable period.

Learned advocate Mr. K.M. Patel appearing for the petitioner submits that if the said amount is not paid by the petitioner so far, same will be paid by the petitioner to the respondents within one month from today.

In view of this, it is directed to the petitioner to pay last drawn wages under section 17B of the ID Act, 1947 to both the respondents from September, 2003 till April, 2004, if the same is not paid by the petitioner so far, within one month from the date of receipt of copy of this order.

It is clarified that this order has been passed by this Court considering the legal aspect as to whether the Tribunal has rightly come to the conclusion that the complaint is maintainable or not. Thus, this Court has not examined the merits of the matter at all as to whether the workmen were appointed by the petitioner or the Labour Contractor. This Court has not expressed any opinion about the relationship between the parties.

Learned advocate Mr. Parikh appearing for the

respondents workmen is having apprehension that in case if the workmen raise the industrial dispute under section 2(a) of the Industrial Disputes Act, 1947, then, the question of delay may come in their way. Considering the submissions made by the learned advocates for the parties, it is observed that now it will be open for the respondents workmen to raise industrial dispute challenging their termination under section 2(a) of the Industrial Disputes Act, 1947. As and when such dispute is raised by the respondents, naturally, the time consumed in the present proceedings cannot come in the way of the respondents as a delay for raising the dispute.

(H.K.Rathod,J.)

Vyas